

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY**

CAROLYN DIANA DAVIS, as the
Administratrix of the ESTATE OF
CHARLES TIMOTHY DAVIS,

Plaintiff,

v.

Civil Action No. 5:18-cv-00530

THE UNITED STATES,

Defendant.

**COMBINED MOTION OF THE UNITED STATES TO DISMISS
PLAINTIFF’S AMENDED COMPLAINT AND THIS CIVIL ACTION
AND MEMORANDUM IN SUPPORT INCORPORATED BY REFERENCE**

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and other applicable federal law, defendant United States of America (“United States”) moves the Court to dismiss plaintiff’s Amended Complaint (ECF No. 16) and this civil action on the grounds stated in the motion to dismiss previously filed by the United States (ECF No. 10) and the memorandum filed in support of that motion (ECF No. 11-1), both of which are incorporated herein by reference. Plaintiff has still not cited any specific mandatory directives allegedly violated by MSHA employees. Instead, the Amended Complaint refers to disciplinary records of various MSHA employees issued for “failing to provide adequate management,” failing to adequately “evaluate the results of policy implementation,” and an allegation that “you could have carried out your duties better.” ECF No. 16 at ¶¶40-41.

None of these specific allegations are relevant to the Government’s argument in its Motion to Dismiss. See ECF No. 10 at p. 1; ECF No. 11-1 at pp. 6-25 (page numbers of brief). As noted in that Motion, the Discretionary Function Exception to the Federal Tort Claims Act,

(FTCA) 28 U.S.C. § 1346 *et seq.* requires dismissal of this Complaint, whether or not that discretion was abused. U.S.C. § 2680(a). See ECF No. 11-1 at pp. 6-25 (page numbers of brief). See also Baer v. United States, 722 F.3d 168, 177 (3d Cir. 2013) (“Likewise, the allegation that disciplinary proceedings have been brought against certain SEC examiners does not help Appellants establish that any SEC employee violated a mandatory policy, and, thus, does not allow Appellants to overcome the application of the DFE.”), cited with approval in Seaside Farm, Inc. v. United States, 842 F.3d 853, 861 (4th Cir. 2016).

To the extent new paragraph 44 of the Amended Complaint relies on an allegation of advance notice by MSHA inspectors, this allegation is unsubstantiated, vague, alleges no time frame, and there is no supporting information from any source out of the numerous investigations conducted after the accident that this conduct ever occurred .

Therefore, for the reasons alleged here, as well as in the government’s previously submitted Motion to Dismiss (ECF No. 10) and supporting memorandum of law (ECF No. 11-1), the United States respectfully requests that this Court dismiss this civil action, grant judgment in its favor, and grant the United States such other and further relief as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Fred B. Westfall, Jr., Assistant United States Attorney for the Southern District of West Virginia, hereby certify that on July 23, 2018, I electronically filed the foregoing **COMBINED MOTION OF THE UNITED STATES TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND THIS CIVIL ACTION AND MEMORANDUM IN SUPPORT INCORPORATED BY REFERENCE** with the Clerk of the Court using the CM/ECF system which will send notification to the following CM/ECF participants:

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